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EVIDENCE—HEARSAY IN GENERAL—APPLICABILITY OF THE HEARSAY RULE TO CONDUCT OF THIRD PERSON.—At the trial of an indictment for murder, the defendant set up, among other defenses, that his blow did not cause the death of the deceased, who had previously been struck by the independent act of a third person. The trial court refused an instruction that the flight of this third person from the scene of the crime should be considered as substantive testimony tending to exculpate the defendant. *Held*, that the instruction was properly refused. *State v. Piernot*, 149 N. W. 446 (Ia.).

The court argues that the flight is barred by the hearsay rule, under the prevailing view that confessions of crime by third persons are inadmissible. *Donnelly v. United States*, 228 U. S. 243. See 26 HARV. L. REV. 755. This is highly questionable. The hearsay rule is designed to exclude assertions upon the credit of persons not sworn and not subject to cross-examination. See 2 WIGMORE, EVIDENCE, § 1362. But conduct, as distinguished from statements or "acts whose import is that of a statement," is not covered by the rule. See PHIPSON, EVIDENCE, 5 ed., 207; 15 AM. L. REV. 71, 77. See also 26 HARV. L. REV. 148. This is evident from a variety of cases. See 1 WIGMORE, EVIDENCE, §§ 272, 461, 462. For instance, a falling off of patronage was admitted to prove that the defendant had injured the plaintiff's product, although the principal case might twist this conduct into an unsworn assertion by third parties that the quality of the article had suffered. *Cunningham v. Stein*, 109 Ill. 375. Similarly, the flight of the third person, if relevant, should be clearly admissible, for it involves no reliance on the credit of any declarant out of court. Nevertheless many courts agree with the principal case in excluding the evidence. *Owensby v. State*, 82 Ala. 63, 2 So. 764. *Ott v. State*, 160 Ala. 29, 49 So. 810. *State v. White*, 68 N. C. 158. *Contra, Jackson v. State*, 67 S. W. 497 (Tex.). It is a narrow enough rule that refuses to admit confessions of guilt by third parties, and it seems highly undesirable, as well as totally indefensible, to reject by analogy evidence not at all within the proper scope of the hearsay rule. The result of the principal case, however, may perhaps be sustained on the ground that the flight of the other actor, however much it may have indicated the consciousness of a criminal act on his part, was not inconsistent with the defendant's act being the fatal force, and was, therefore, irrelevant.

EVIDENCE—TESTIMONY GIVEN AT FORMER TRIAL—ADMISSIBILITY OF TESTIMONY AT CRIMINAL TRIAL IN A SUBSEQUENT CIVIL ACTION.—In an action for damages for personal injuries, the plaintiff introduced evidence of the testimony of a witness, since deceased, in a criminal action against the defendant for the same injury. *Held*, that the evidence is admissible. *Ray v. Henderson*, 144 Pac. 175 (Okla.).

The testimony of a deceased witness in a prior action is said to be admissible in a subsequent action involving the same issue, when it is between the same parties or their privies. The requirement that both parties be the same seems to have been based upon some theory of mutuality of admissibility of the evidence against either party. *Morgan v. Nicholl*, L. R. 2 C. P. 117; *Metropolitan Street Ry. v. Gumby*, 39 C. C. A. 455, 99 Fed. 192. But the theory of this exception to the hearsay rule depends not upon the idea of fairness to both sides, but on whether the party against whom the evidence is offered has had sufficient opportunity to cross-examine the witness concerning the matter in issue. *Charlesworth v. Tinker*, 18 Wis. 633. Upon this theory, the testimony of a witness at a criminal trial has been held admissible against the same defendant in a later civil action involving the same issue, the witness having died in the meantime. *Kreuger v. Sylvester*, 100 Ia. 647, 69 N. W. 1059; *Gavan v. Ellsworth*, 45 Ga. 283. *Contra, McInturff v. Insurance Co. of N. A.*, 248 Ill. 92, 93 N. E. 369. *Harger v. Thomas*, 44 Pa. St. 128. The principal